Supreme Court, U.S.
FILED
MAY 5 1995
OFFICE OF THE CLERK

No. 94-1317

In the Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL SUGRUE, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction over petitioner's statutory and constitutional challenges to the Veterans' Administration's disability benefit determination.

2. Whether petitioner's action against officials of the Department of Veterans Affairs in their individual capacities failed to state a claim upon which relief could be granted.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 26 F.3d 8. The initial opinion of the district court (App., *infra*, 12a-23a) is reported at 808 F. Supp. 946. The order of the district court denying reconsideration and amending the opinion (App., *infra*, 24a-31a) is unreported.[1]

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[1] Due to a number of omissions and typographical errors in petitioner's appendix, we have elected to reprint the opinions and orders in an appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1994. A petition for rehearing was denied on August 31, 1994. On January 18, 1995, Justice Ginsburg entered an order extending the time within which to file a petition for a writ of certiorari to and including January 28, 1995 (a Saturday). The petition for a writ of certiorari was filed on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a veteran of the United States Army who was a prisoner of war in Korea between April, 1951, and August, 1953. App., *infra*, 13a. Following his release, petitioner complained of hand tremors, and a 1954 medical examination conducted by the Veterans' Administration (VA)[2] diagnosed petitioner as suffering from "Parkinsonism" and "Anxiety Reaction." *Ibid.* His condition was determined by the VA's adjudication division as constituting a 30% disability. *Id.* at 13a-14a.

In February, 1983, petitioner sought medical care at a VA facility. App., *infra*, 14a. Petitioner was examined at that time by a VA neurologist, who determined that petitioner suffered from "a marked neurological impairment" that "approached total disability for work." *Id.* at 14a, 30a. Following that diagnosis, which was recorded in petitioner's medical

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[2] The Veterans' Administration was redesignated as the Department of Veterans Affairs by the Department of Veterans Affairs Act, Pub. L. No. 100-527, § 2, 102 Stat. 2635 (1988). Both the Department and the Administration will be referred to as the "VA."

records, petitioner filed with the VA a claim for additional disability benefits. *Id.* at 14a. On April 6, 1983, in a letter from respondent S. Wohl, the VA rejected petitioner's claim on the ground that the evidence in petitioner's medical records did not warrant any change in petitioner's prior disability determination. *Ibid.*

Thereafter, petitioner filed a timely Notice of Disagreement on April 5, 1984. App., *infra*, 14a; see 38 U.S.C. 4005(a) and (b) (1982). Respondent Robert J. Schmidt, the regional VA adjudication officer, responded to the Notice of Disagreement by offering petitioner a neuropsychiatric examination. App., *infra*, 3a, 14a, 30a; see 38 U.S.C. 4005(d)(1) (1982). After that examination, respondent Schmidt notified petitioner on October 16, 1984, that, based on the new examination, his disability rating would be increased from 30% to 50%. App., *infra*, 14a, 30a. Dissatisfied with that result, petitioner appealed to the Board of Veterans' Appeals (BVA). *Id.* at 14a; see 38 U.S.C. 4005(a) (1982). Following a hearing at which petitioner was represented by counsel, the 50% disability determination was affirmed on June 10, 1988. App., *infra*, 3a, 14a-15a, 29a n.4.

2. On June 11, 1990, petitioner filed suit in the United States District Court for the Eastern District of New York. App., *infra*, 13a. Petitioner alleged that the VA and various identified and unidentified VA employees (1) failed to maintain his complete medical record by not performing the complete neurological examination that petitioner requested, in violation of the Privacy Act of 1974, 5 U.S.C. 552a; (2) failed to publish the criteria used to determine his disability rating in the *Federal Register*, in violation of the Freedom of Information

Act (FOIA), 5 U.S.C. 552; and (3) failed to follow VA regulations by not providing him with a complete neurological examination which led to an inaccurate disability determination, in violation of petitioner's Fifth Amendment rights to due process and freedom from the taking of property without compensation. App., *infra*, 4a, 16a-17a. Petitioner's complaint sought relief that would place him "in the position he would have occupied but for the * * * unlawful acts and conduct [of the respondents] and mak[e] him whole for all entitlements and benefits he would have received but for [said] unlawful acts and conduct." *Id.* at 30a.

The district court dismissed petitioner's claims against the VA for lack of subject matter jurisdiction, finding that 38 U.S.C. 511(a)[3] precluded judicial review of claims affecting VA determinations of disability ratings. App., *infra*, 17a-21a. The court also dismissed the claims against the individual defendants for failure to state a claim, holding that an action brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), could not lie against VA employees arising out of a disability benefit level determination because the clear intent of Congress to restrict judicial review of decisions of the VA regarding benefits would be severely undermined if veterans were allowed to sue individual VA employees for their role in making benefits determinations. App., *infra*, 21a-23a.

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[3] Because portions of Title 38 were renumbered in 1991 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378, references to sections of that title will be to the 1991 United States Code Supplement unless otherwise noted.

3. The court of appeals affirmed. App., *infra*, 1a-11a. With respect to the claim against the VA, the court of appeals held that under 38 U.S.C. 511(a) the district court did not have jurisdiction over petitioner's claim even though petitioner framed his action seeking judicial review of the VA's disability determination in constitutional and statutory terms. App., *infra*, 4a-7a. With respect to the claims against the individual VA employees, the court held that, since Congress made it clear that the BVA's review of disability determinations was exclusive, no private right of action could lie against government officials with respect to the assignment of a disability rating in an individual case. *Id.* at 9a-10a. The court found that the review available to petitioner provided him "meaningful remedies in a multitiered and carefully crafted administrative process" and indicated that the failure of Congress to provide a remedy against individual VA employees was not an oversight. *Id.* at 10a.

ARGUMENT

1. Petitioner argues (Pet. 4-5, 10, 12, 25-27) that the district court had jurisdiction over his statutory and constitutional claims. Petitioner first contends (Pet. 9-14, 26) that the courts below erred in measuring the district court's jurisdiction under the statute in force at the time petitioner filed his suit rather than the statute in force at the time he filed his Notice of Disagreement.[4] But see *Landgraf* v.

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[4] 38 U.S.C. 211 (1982) was amended by the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105-4106 (1988), and was codified at 38 U.S.C. 211 (1988). Amended Section 211 was later recodified without substantive change at

USI Film Prods., 114 S. Ct. 1483, 1501-1502 (1994). Because the result in this case is unaffected by which statute is applied, we do not address that claim. Instead, assuming *arguendo* that 38 U.S.C. 211 (1982) governed the district court's jurisdiction at the time it dismissed petitioner's suit, the courts below correctly determined that they did not have jurisdiction to consider his claims.

Section 211(a) provided that "the decisions of the [Secretary] on any question of law or fact under any law administered by the [VA] providing benefits for veterans * * * shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." As this Court noted, "Congress established no judicial review for VA decisions until [the enactment of the Veterans' Judicial Review Act (VJRA)], only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 557 (1994).[5]

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38 U.S.C. 511. See Pub. L. No. 102-83, § 2(a), 105 Stat. 388-389 (1991).

[5] VJRA was enacted on November 18, 1988. If petitioner had filed a Notice of Disagreement after the enactment of VJRA, his claims could have been considered by the Court of Veterans Appeals. See 38 U.S.C. 511(b)(4), 7251 note; 38 C.F.R. 20.1201. However, petitioner's Notice of Disagreement was filed prior to enactment of VJRA and thus that court has no jurisdiction over his claims. See *Belarmino* v. *Derwinski*, 931 F.2d 1543, 1544 (Fed. Cir. 1991); *Prenzler* v. *Derwinski*, 928 F.2d 392, 393-394 (Fed. Cir. 1991). Petitioner, however, may request that his claim be reopened in order to submit "new and material evidence." 38 U.S.C. 5108, 7104(b); see App., *infra*, 31a. The VA's decision on that request would be appealable to the Court of Veterans Appeals. Cf. 38 C.F.R. 20.1105.

Petitioner claimed (App., *infra*, 3a-4a, 16a) that the final decision of the Secretary was made in violation of the Privacy Act and FOIA because the VA did not maintain petitioner's records accurately and because the VA relied on materials which ought to have been published in the *Federal Register*. Those failures allegedly affected the Secretary's disability determination. Petitioner's claims, however, are collateral attacks on a final benefits decision under a law administered by the Secretary and thus cannot be reviewed under Section 211. See, *e.g.*, *Gott* v. *Walters*, 756 F.2d 902, 904 n.1, 907 n.6, 910 (Scalia, J.), vacated and dismissed, 791 F.2d 172 (D.C. Cir. 1985); *Pellerin* v. *Veterans Admin.*, 790 F.2d 1553, 1555 (11th Cir. 1986); *Rosen* v. *Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); cf. *Heck* v. *Humphrey*, 114 S. Ct. 2364, 2371-2373 (1994).

Nor did the district court have jurisdiction over petitioner's due process claims (Pet. 12, 14-15, 24-29). Petitioner alleges (Pet. 15, 25-28) that the failure to perform a neurological examination and the failure to refer to regulations when denying him full disability benefits constituted violations of due process because VA regulations were violated and the violation impeded an accurate resolution of his claim. Further, petitioner argues (Pet. 12, 28-29) that the Secretary effected a taking by denying his claim. Whatever the merits of those claims, they are in essence challenges to the application of "particular provision[s] * * * to a particular set of facts" and this Court has made clear that such challenges are precluded. *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974); see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985) (jurisdiction available for attacks

"on the operation of the claims *system*[]" (emphasis added)).

2. Petitioner claims (Pet. 16-23) that the court of appeals erred in declining to recognize a *Bivens* action for due process violations of VA employees arising out of disability benefit determinations. Petitioner does not cite (nor have we been able to locate) any other court of appeals' decision that has considered the question of a *Bivens* action in these circumstances.

This Court has generally refused to recognize *Bivens* claims in connection with federal benefits determinations. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983). This is because such programs usually contain integrated review schemes to address inaccurate determinations. See *Schweiker*, 487 U.S. at 427-428; *Lucas*, 462 U.S. at 388; cf. *FDIC* v. *Meyer*, 114 S. Ct. 996, 1005 (1994) (recognition of *Bivens* action influenced by the existence of other remedies). Significant administrative remedies were available to petitioner for review of the VA's decision regarding his disability level. In response to petitioner's Notice of Disagreement, he was provided with an additional medical examination, which resulted in the increase of his disability rating from 30% to 50%. App., *infra*, 14a. When petitioner continued to disagree with the VA's diagnosis of his condition, the dispute was reviewed by the BVA, which ultimately affirmed the decision of the VA regarding his disability level after a hearing at which petitioner was represented by counsel. *Id.* at 3a.

Although petitioner could not have this determination reviewed by a district court of the newly formed Court of Veterans Appeals, this restriction was

consonant with the prevailing congressional view that additional avenues for litigation were unnecessary and counterproductive. See *Walters*, 473 U.S. at 323-326; *Johnson*, 415 U.S. at 370. The ultimate creation of the Court of Veterans Appeals, following years of congressional attention to the issue of judicial review of VA determinations, "suggest[s] that Congress' failure to create a remedy against individual employees of the VA was not an oversight." App., *infra*, 10a; cf. *Schweiker*, 487 U.S. at 425-426; *Lucas*, 462 U.S. at 389. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [this Court has] not created additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 483, 686, DOCKETS 93-6137, 93-6139

DANIEL SUGRUE, PLAINTIFF-APPELLANT

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF THE SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS-APPELLEES

Argued Oct. 20, 1993

Decided May 17, 1994

Before: MAHONEY and WALKER, Circuit Judges, and METZNER* District Judge.

MAHONEY, Circuit Judge:

Plaintiff-appellant Daniel Sugrue appeals from a judgment entered January 4, 1993 in the United States District Court for the Eastern District of

* The Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

New York, I. Leo Glasser, *Judge*, that dismissed Sugrue's actions against the Department of Veterans Affairs[1] for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), and against several named and unnamed employees of the VA (the "VA Employees") for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). *See Sugrue v. Derwinski*, 808 F.Supp. 946 (E.D.N.Y.1992) (opinion supporting judgment), as amended by *Sugrue v. Derwinski*, No. CV-90-1972, slip op. at 7 (E.D.N.Y. Mar. 26, 1993). Sugrue's complaints against the VA and the VA Employees alleged that the defendants had violated his rights under the Fifth Amendment to the Constitution, the Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, in determining his disability benefit award.

We affirm.

Background

This dispute stems from long term injuries sustained by Daniel Sugrue when he was held as a prisoner of war. During the Korean War, Sugrue, then a soldier in the United States Army (the "Army"), was a prisoner of war from April 1951, when he was taken captive, to August 1953, when he was released at the conclusion of that conflict. Sugrue was honorably discharged from the Army in 1953. At that time, an Army medical examination revealed that

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[1] The Veterans' Administration, the predecessor to the Department of Veterans Affairs, was redesignated as the Department of Veterans Affairs by the Department of Veterans Affairs Act, Pub.L. No. 100-527, § 2, 102 Stat. 2635, 2635 (1988). Both the Department and the Administration are hereinafter referred to as the "VA".

Sugrue suffered from "Parkinsonism" and "Anxiety Reaction." In that connection, a VA adjudication division rated him as thirty percent disabled.

In 1981, the VA advised former prisoners of war of legislation enabling them to obtain medical care at VA facilities. *Id.* On February 14, 1983, Sugrue availed himself of this service and underwent a medical examination at a VA facility by a neurologist retained by the VA. According to Sugrue, the neurologist determined that Sugrue, a lawyer, suffered from a neurological disorder resulting in near "total disability for work as an attorney."

Sugrue filed a claim with the VA based upon this diagnosis. By letter dated April 6, 1983, S. Wohl, one of the VA Employees, rejected Sugrue's claim on the ground that "the evidence d[id] not warrant any change" in the prior disability determination.

On April 5, 1984, Sugrue initiated an administrative appeal of this finding by filing with the VA a notice of disagreement challenging the VA's failure to raise his disability rating. *See* 38 U.S.C. 4005 (1988) (recodified as 38 U.S.C. § 7105 (Supp. III 1991)). By letter dated April 11, 1984, Robert J. Schmidt (another of the VA Employees), a regional VA adjudication officer, invited Sugrue to undergo a neuropsychiatric examination. Following examinations by a psychiatrist and a neurologist, the VA increased Sugrue's disability rating to fifty percent. Sugrue continued to disagree with his disability rating, and pursued his case before the Board of Veterans Appeals (the "BVA"). After a hearing at which Sugrue's claim was presented by counsel, however, the BVA affirmed his fifty percent disability rating.

Sugrue then filed the instant actions, contending that the VA and the VA Employees violated (1) the

Privacy Act, 5 U.S.C. § 552a, as a result of the VA's failure to maintain its record regarding Sugrue "with accuracy, relevance, timeliness, and completeness, necessary to assure fairness to [Sugrue] in reaching its determination;" (2) the FOIA, 5 U.S.C. § 552, in that "[Sugrue's] claim and defendants [sic] adverse determination thereof was [sic] affected by matter required to be published in the Federal Register and not so published;" (3) the Fifth Amendment guarantee of due process; and (4) the Fifth Amendment prohibition against the taking of private property for public use without just compensation.

The district court dismissed the complaints, for lack of subject matter jurisdiction as to the complaint against the VA, *see Sugrue*, 808 F.Supp. at 950, and for failure to state a claim as to the complaint against the VA Employees. *See id.* at 951. The district court also denied Sugrue's motion to amend his complaint against the VA to add the VA Employees as individual defendants. *See id.*

This appeal followed.

Discussion

38 U.S.C. § 511 (Supp. III 1991) provides in pertinent part that:

> (a) The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . . Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

Section 502 relates to judicial review of rules and regulations to which reference is made by 5 U.S.C. § 552(a)(1) or 553 (regarding rules and regulations that federal agencies are required to promulgate by FOIA), but § 502 review is available only in the Court of Appeals for the Federal Circuit. Sections 1975 and 1984 relate to civil actions regarding life insurance. Chapter 37 relates to housing and small business loans.

Chapter 72 relates to the United States Court of Veterans Appeals, an Article I court established in 1988 that has "exclusive jurisdiction to review decisions of the [BVA]." 38 U.S.C. § 4052(a) (1988) (recodified as 38 U.S.C. § 7252(a) (Supp. III 1991)). However, that jurisdiction is available only as to "any case in which a notice of disagreement is filed under section 4005 [now § 7105] of title 38 . . . on or after the enactment of [Public Law No. 100-687; i.e., November 18, 1988]." Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub.L. No. 100-687, § 402, 102 Stat. 4105, 4122; *see also Prenzler v. Derwinski*, 928 F.2d 392, 393-94 (Fed.Cir.1991). As

indicated earlier, Sugrue filed his notice of disagreement on April 5, 1984.

Accordingly, none of the exceptions stated in § 511(b) apply in this case, and the governing rule is provided by § 511(a)'s bar of review of the VA's determination of Sugrue's benefit level "by any court, whether by an action in the nature of mandamus or otherwise." As Judge Glasser correctly ruled, this language prevented the district court from exercising subject matter jurisdiction over Sugrue's claims against the VA. *See Sugrue*, 808 F.Supp. at 949-50.

Section 511(a) is designed to (1) ensure that benefits claims will not burden the courts and the VA with litigation, and (2) promote the adequacy and uniformity of complex veterans' benefits decisions. *Johnson v. Robison*, 415 U.S. 361, 369-70, 94 S.Ct. 1160, 1166-67, 39 L.Ed.2d 389 (1974).[2] In *Johnson*, the Court distinguished between suits challenging the constitutionality of the statutes underlying veterans programs, to which § 511(a) does not apply (over which courts thus have jurisdiction), and actions of the VA under those statutes in determining qualification for benefits, to which § 511(a) does apply (over which courts therefore lack jurisdiction). *See Johnson*, 415 U.S. at 367-74, 94 S.Ct. at 1165-69; *Larrabee*, 968 F.2d at 1500.

Sugrue's claims against the VA challenge the VA's denial of a certain level of benefits to Sugrue based

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[2] Section 511 was enacted by the Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991). It replaced, however, a substantially identical predecessor provision, *see* 38 U.S.C. § 211(a) (1988), that was construed in *Johnson*. *See Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500 (2d Cir. 1992) (noting that 1970 version of § 211(a) substantially similar to current § 511(a)).

upon a disputed disability rating. His complaints seek "to place plaintiff in the position he would have occupied but for the . . . unlawful acts and conduct [of the VA and the VA employees] and mak[e] him whole for all entitlements and benefits he would have received but for [said] unlawful acts and conduct."

Although Sugrue's complaints invoke provisions of the Fifth Amendment and are styled in part as constitutional actions, the courts do not acquire jurisdiction to hear challenges to benefits determinations merely because those challenges are cloaked in constitutional terms. *See Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8, 9 (2d Cir.) (per curiam) ("one may not circumvent § [5]11(a) by seeking damages on a constitutional claim arising out of a denial of benefits") (collecting cases), *cert. denied*, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985); *see also Larrabee*, 968 F.2d at 1500 (§ 511(a) "precludes judicial review of non-facial constitutional claims") (collecting cases). Similarly, neither the Privacy Act nor the FOIA may be used as a rhetorical cover to attack VA benefits determinations.

We turn to Sugrue's claims against the VA Employees. In accordance with *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), we decline, as did the district court, to find that a cause of action lies against the VA Employees in their individual capacities.

In *Bush*, an employee of the National Aeronautics and Space Administration sued the Director of the George C. Marshall Space Flight Center (the "Center") after the Director demoted the employee, allegedly in retaliation for publicly critical remarks made by the employee about the Center. The

employee sought damages for a claimed violation of his rights under the First Amendment. The Supreme Court noted that although *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and its progeny had established that the Constitution supports private causes of action against federal officials for constitutional torts, *see Bush*, 462 U.S. at 374, 103 S.Ct. at 2409, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service." *Id.* at 389, 103 S.Ct. at 2417. Accordingly, the Court declined to find a new private right of action for a federal employee when comprehensive federal legislation had already established "an elaborate remedial system that ha[d] been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388, 103 S.Ct. at 2417.

In *Chilicky*, the Court rejected claims premised upon the denial of Fifth Amendment rights that were advanced by social security disability benefit recipients against federal and state officials who administered the disability benefit program. After detailing the multilayered remedial scheme available to benefits claimants under the social security disability program, the Court held that the case could not be reasonably distinguished from *Bush*, stating:

> Here, exactly as in *Bush*, Congress has failed to provide for "complete relief": respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits. The creation of a *Bivens* remedy would obviously

> offer the prospect of relief for injuries that must now go unredressed. Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were. Indeed, the system for protecting their rights is, if anything, considerably more elaborate than the civil service system considered in *Bush*.

487 U.S. at 425, 108 S.Ct. at 2468-69 (citations omitted); *cf. FDIC v. Meyer*, —- U.S. ——, ——, 114 S.Ct. 996, 1006, 127 L.Ed.2d 308 (1994) (declining to authorize *Bivens* actions against federal agencies).

In our view, the same reasoning applies in the context of veterans' benefits. Sugrue's action against the VA Employees is based solely upon their acts or omissions concerning the assigning of a disability rating, and hence a benefit level, to Sugrue. Congress has enacted a comprehensive remedial structure to address disputes regarding disability ratings and benefits claims by veterans.

A veteran claiming disability benefits from the VA enjoys "a beneficial non-adversarial system" of adjudicating veterans benefits claims in which the VA is "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R.Rep. No. 963, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. For example, at the time when Sugrue's VA claim was under administrative consideration, the VA was required to assist claimants in obtaining evidence in support of their claims, 38 U.S.C. § 3007(a) (1988) (recodified as 38 U.S.C. § 5107(a) (Supp. III 1991)). Moreover, claimants were entitled to: (1) receive the benefit of the doubt in proving benefit claims, 38

U.S.C. § 3007(b) (1988) (recodified as 38 U.S.C. § 5107(b) (Supp. III 1991)); and (2) reopen disallowed claims by submitting new and material evidence. 38 U.S.C. § 3008 (recodified as 38 U.S.C. § 5108 (Supp. III 1991)).

As in *Bush* and *Chilicky*, the scheme of review for veterans' benefit claims provides meaningful remedies in a multitiered and carefully crafted administrative process. Further, the fact that Congress has explicitly foreclosed a remedy in Article III courts against the VA, *see* § 511(a), and the policies underlying that prohibition, *see Johnson*, 415 U.S. at 369-70, 94 S.Ct. at 1166-67, suggest that Congress' failure to create a remedy against individual employees of the VA was not an oversight. Finally, Congress has accorded frequent attention to the issue of judicial review of VA benefits determinations, and only in 1988 did it provide for a limited form of review when it established the United States Court of Veterans Appeals, an Article I court authorized to review BVA decisions. *See* Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub.L. No. 100-687, §§ 301-303, 102 Stat. 4105, 4113-22 (codified in scattered sections of 38 U.S.C.); H.R.Rep. No. 963 at 10-13, *reprinted in* 1988 U.S.C.C.A.N. at 5792-94 (recounting numerous previously unsuccessful attempts to enact judicial review of veterans benefits determinations). This history provides additional evidence that Congress has declined to enact the remedy that Sugrue asks us to create against the VA Employees. Following *Bush* and *Chilicky*, we will not create such a remedy when Congress has chosen not to do so.

Conclusion

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nos. CV-90-1972; CV-91-2041

DANIEL SUGRUE, PLAINTIFF

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, DEFENDANT

DANIEL SUGRUE, PLAINTIFF

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS

Dec. 18, 1992

MEMORANDUM AND ORDER

GLASSER, District Judge:

In two pending actions, plaintiff Daniel Sugrue alleges that the Department of Veterans Affairs ("VA") and its employees violated his constitutional

and statutory rights in determining his veterans' benefits award. Plaintiff moves to serve a second amended complaint in the first action, CV-90-1972 ("Sugrue I"), which is identical to a complaint already filed in the second action, CV-91-2041 ("Sugrue II"). The government moves to dismiss both Sugrue I and Sugrue II for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment. For the following reasons, the government's motion to dismiss is granted in both actions and the plaintiff's motion to amend his complaint in Sugrue I is denied.

FACTS

On June 11, 1990, plaintiff Daniel Sugrue, an attorney admitted to the New York bar in 1961, commenced an action against defendant Thomas Derwinski, Secretary of the VA, alleging that the VA in setting his disability rating at 50 percent and refusing to revise that disability rating, violated the Privacy Act ("PA"), 5 U.S.C. § 552a; the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; and his rights to Due Process. In an amended complaint, filed on October 9, 1990, plaintiff repeated those claims, but added a claim that his property was taken without just compensation in violation of the Fifth Amendment and requested damages.

Plaintiff was a prisoner of war during the Korean War from April 1951 until his release in August 1953. When he was released, plaintiff complained of hand tremors. At a medical examination conducted by the VA on January 19, 1954, plaintiff was diagnosed as suffering from (1) Parkinsonism and (2) Anxiety Reaction. On March 17, 1954, the Adjudication Division gave plaintiff a disability rating of 30 percent

based on his medical condition of "Anxiety Reaction with Parkinson Features, Chronic Mod. Severe."

In 1981, former prisoners of war were notified of recent legislation allowing them to seek medical assistance at VA facilities. Amended Complaint at ¶ 37. On February 14, 1983, plaintiff was examined by a neurologist in a VA facility. The examining physician, Dr. Bennett Derby, who was not a VA employee, determined that plaintiff suffered from "a marked neurological impairment" which "approached total disability for work as an attorney." Amended Complaint at ¶¶ 40, 41. In addition, the test results of the neurological examination were recorded. Thereupon, plaintiff filed a claim for veterans' benefits, contending that this neurological impairment originated when he was a prisoner of war. On April 6, 1983, in a letter of S. Wohl, the VA rejected this claim based on plaintiff's outpatient medical records of October 15, 1982 through February 14, 1983, including the results of the tests performed by Dr. Derby, but did not mention Dr. Derby's diagnosis.

Plaintiff timely filed a Notice of Disagreement on April 5, 1984. Plaintiff was then sent to a psychiatrist, Dr. Abeles, and another neurologist, Dr. Barrett. Based on those examinations, in a letter dated October 16, 1984, Robert Schmidt, Adjudication Officer, notified plaintiff that his nervous condition would be increased to a 50 percent disability rating. Plaintiff disagreed with this determination and argued that he was entitled to a higher rating based on the aggregate of his medical conditions: hand tremors and neurological disorder. The Board of Veterans Appeals ("Board" or "BVA") disagreed. The Board affirmed the determination of the VA, finding that the tremors and the neurological disorder

were part of a single disability, only entitling plaintiff to a 50 percent disability rating.

On June 7, 1991, plaintiff sought to file a second amended complaint in Sugrue I to name Robert Schmidt, an Assistant Adjudication Officer at the VA's New York Regional Office, S. Wohl[1], and certain unidentified individuals as defendants (collectively "the individual defendants"). On that same day—June 7, 1991—plaintiff filed an identical complaint in Sugrue II against the VA and the individual defendants to prevent the expiration of the statute of limitations. Plaintiff now moves this Court for leave to file his proposed second amended complaint in Sugrue I.

The government opposes plaintiff's motion to amend the complaint in Sugrue I and cross-moves to dismiss both actions under Fed.R.Civ.P. 12(b)(1) and (b)(6) and, in the alternative, for summary judgment under Fed.R.Civ.P. 56 in both actions.[2] For the following reasons, plaintiff's motion to amend the complaint in Sugrue I is denied, and the government's motion to dismiss Sugrue I and Sugrue II for lack of subject matter jurisdiction is granted.

DISCUSSION

Plaintiff asserts four grounds for relief against the VA in Sugrue I and against the VA and the individual defendants in Sugrue II, alleging that they violated

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[1] According to the government, S. Wohl died on December 27, 1985, six years prior to the commencement of Sugrue II.

[2] The government also argues that the United States Attorney General was not served with the summons and complaint in Sugrue I. However, as plaintiff correctly points out, the Attorney General was timely served on October 9, 1990, as indicated on the return receipt card attached to the Summons.

(1) the Privacy Act ("PA"); (2) the Freedom of Information Act ("FOIA"); (3) the Due Process clause of the Fifth Amendment; and (4) the Takings Clause of the Fifth Amendment. However, since the plaintiff seeks, in essence, judicial review of his disability rating and of his benefits award, all four claims for relief must be dismissed for lack of subject matter jurisdiction.

All of plaintiff's claims stem from his contention that various internal procedures of the VA entitled him to a complete neurological examination by the Department of Medicine and Surgery of the VA which the BVA overlooked in denying him veterans' benefits.[3] Plaintiff's PA challenge is premised on the fact that the BVA did not include the information which a neurological examination would have revealed. Pl's Memo. of Law in Opp'n to Def's Motions to Dismiss at 30 ("Memo. in Opp'n"). The FOIA claim likewise challenges his disability rating on the ground that the VA failed to promulgate a regulation that two claimed disabilities—namely, a neurological condition of essential tremors and a disability of anxiety disorder—would be considered part of a single disability. Memo. in Opp'n at 41. Plaintiff's Procedural Due Process claim is based on the Secretary's failure to afford him a complete neurological examination which potentially could increase his disability rating.[4] Memo in Opp'n at 46-

[3] The regulations promulgated by the VA provide for medical examinations of applicants for veterans' benefits. 38 C.F.R. § 3.326. In this case, plaintiff was examined by two neurologists: Dr. Derby on February 14, 1983 and by Dr. Barrett in 1984. However, plaintiff contends that he should have undergone a complete neurological examination.

[4] In addition, plaintiff argues that the reduction of benefits for his hand tremors that he received in 1954 constitutes a

47, 51-52. Because this Court is precluded from reviewing VA determinations of benefits awards or of disability ratings, this action must be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

Section 511 of Title 38 provides:

> The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . . Subject to [the exceptions listed in] subsection (b), *the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court*, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a) (emphasis added).[5]

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taking. Under 38 U.S.C. § 110, a disability rating which has been in effect for twenty years can only be reduced upon a showing of fraud. Plaintiff apparently believes that the Secretary reduced his disability rating for the hand tremors when he combined plaintiff's neurological condition with his hand tremors. However, the fallacy of this argument is readily apparent since plaintiff's 30% disability rating was increased to 50% based on his anxiety disorder, which already included the disability rating associated with plaintiff's hand tremors. Accordingly, plaintiff's disability rating for his hand tremors was never reduced.

[5] None of the four exceptions enumerated in subsection (b) of section 511 is applicable to this case. Subsection (b) allows judicial review:

> (1) by the Court of Appeals for the Federal Circuit of alleged violations of FOIA, 5 U.S.C. § 552(a)(1), (agency must publish its procedures in the Federal Register) and § 553 (agency must publish proposed rules in Federal

In *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the Court distinguished between a "review [ ] of those decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans" and questions of law that "arise under the Constitution, not under the statute whose validity is [being] challenged." *Id.* at 367, 94 S.Ct. at 1165-66 (emphasis in original). The Court explained that "[a] decision of law or fact 'under' a statute is made by the [Secretary] in the interpretation or application of a particular provision of the statute to a particular set of facts." *Id.* It is such decision which is barred from judicial consideration under 38 U.S.C. § 511(a).

In *Johnson*, a conscientious objector to the military draft brought a class action challenging the denial of veterans' educational benefits to conscientious objectors, who had completed two years of

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Register) in accordance with 38 U.S.C. § 502. While plaintiff raises a FOIA claim under 5 U.S.C. § 522(a)(1), only the Federal Circuit may have jurisdiction over that challenge;

(2) of cases involving life insurance benefits under 38 U.S.C. §§ 1975, 1984;

(3) of cases involving housing and small business loans under Chapter 37 of Title 38, 38 U.S.C. §§ 3701-3751, and

(4) by the Court of Veterans Appeals under Chapter 72 of Title 38, but only in cases where a veteran filed with the BVA, on or after November 18, 1988, a notice of disagreement with the decision of the VA. Pub.L. No. 100-687, § 402, 102 Stat. 4113, 4122. In this case, plaintiff may not avail himself of that appellate procedure because he filed a notice of disagreement in 1984.

Thus, this Court does not have subject matter jurisdiction over this action under any of these four exceptions.

alternative civilian service, as violative of the First and Fifth Amendments. *Id.* at 363-64, 94 S.Ct. at 1163-64. In upholding the constitutionality of statutes relied upon by the VA, the Court held that section 211 (now section 511) did not preclude judicial review of a constitutional challenge to a decision of Congress to create a statutory class entitled to benefits that does not include conscientious objectors. *Id.* at 367, 94 S.Ct. at 1165-66. That section only bars judicial review of "the [Secretary's] interpretation or application of a particular provision of the statute to a particular set of facts." *Id.* Thus, under *Johnson*, district courts have jurisdiction over actions involving facial challenges to the constitutionality of veterans' benefits legislation—i.e., statutes or regulations—but lack jurisdiction to review the application of such legislation to the particular facts of an individual case. *See also Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1500 (2d Cir.1992) (distinguishing between facial and "as applied" challenges under Johnson). That the district court lacks subject matter jurisdiction to entertain constitutional challenges which are essentially attacks upon awards of veterans' benefits, see *Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8, 9 (2d Cir.1985) (no subject matter jurisdiction over a due process challenge), *cert. denied*, 474 U.S. 851, 106 S.Ct. 150, 88 L.Ed.2d 124 (1985). Thus, plaintiff's challenges to his disability rating premised on the PA, the FOIA, and the Due Process and Takings Clauses are attempts to circumvent 38 U.S.C. § 511(a) by seeking relief on a constitutional claim arising out of a determination concerning veterans' benefits and are dismissed for lack of subject matter jurisdiction.

The plaintiff's reliance upon *Eastern Paralyzed Veterans Assn., Inc.* v. *Veterans' Admin.*, 762

F.Supp. 539 (S.D.N.Y.1991) is misplaced and is clearly distinguishable. That was a class action on behalf of spinal cord injured patients at one VA medical center in which it was alleged that the members of the proposed class were denied rights and benefits provided other spinal cord injured patients at other VA medical centers, thereby depriving them of equal protection and due process. *Id.* at 540-41. In denying the defendants' motion to dismiss for lack of subject matter jurisdiction, the court drew the distinction identified in *Johnson v. Robison*, *supra*. The court emphasized that the plaintiff was not challenging the medical treatment afforded any specific individual, and recognized the continued authority of *Pappanikoloaou* that:

> To the extent the complaint seeks damages for the VA's denial of due process in handling his claim, we agree with those circuits that have held that one may not circumvent [§ 511(a)] by seeking damages on a constitutional claim arising out of a denial of benefits. (citations omitted).

Eastern Paralyzed, 762 F.Supp. at 542 (quoting *Pappanikoloaou*, 762 F.2d at 9). In this case, plaintiff seeks judicial review of his individual veterans' benefits determination which is clearly barred by section 511. Plaintiff also cites two lower court decisions which entertained procedural due process claims against the VA, *Beauchesne v. Nimmo*, 562 F.Supp. 250, 253-54 (D.Conn.1983); *Dumas v. Cleland*, 486 F.Supp. 149, 151-52 (D.Vt.1980); those cases, however, have been displaced by *Pappanikoloaou*. Accordingly, plaintiff's claims against the VA through defendant Secretary are dismissed for lack of subject matter jurisdiction.

The Individual Defendants

In Sugrue II, plaintiff asserts a claim for relief against S. Wohl, Robert J. Schmidt and other unnamed defendants in their individual capacities (collectively "the individual defendants"), for "render[ing] effectively unavailable the [ ] due process rights [of the Fifth Amendment] and the procedural safeguards [of the PA and FOIA]." The individual defendants are named in this action solely for their alleged acts or omissions in denying plaintiff's application for an increased disability rating. Apparently, plaintiff seeks damages against those VA employees in their individual capacity under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), for an alleged due process violation. *Davis v. Passman*, 442 U.S. 228, 248-49, 99 S.Ct. 2264, 2278-79, 60 L.Ed.2d 846 (1979).

In light of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), this Court concludes that a *Bivens* claim cannot lie against VA employees in setting the level of veterans' benefits. In *Bush*, the Court refused to recognize a Bivens claim in the federal employment context because "special factors counsel[ed] hesitation" to create a new remedy where Congress provided for adequate remedies for constitutional violations. 462 U.S. at 388-89, 103 S.Ct. at 2416-17. Likewise, in *Schweiker*, the Court refused to recognize a *Bivens* claim against federal employees who initially denied social security benefits to the plaintiffs. 417-18, 108 S.Ct. at 2464-65. The Court held that the broad remedial structure of that statute was a "special factor" counselling against creating a new remedy. *Id.* at 423, 108 S.Ct. at 2467-68.

Here, the lack of remedies afforded by Congress and the policies underlying the lack of judicial review dictates that individual VA employees be immune from a *Bivens* suit. Allowing a disgruntled veteran to sue VA employees who apply veterans legislation in the course of their duties would severely undermine Congress' intent in precluding judicial review of challenges to veterans' benefits legislation. As the Court noted in *Johnson v. Robison*, the dual purpose of non-reviewability of VA determinations is:

> (1) to insure that veterans' benefits claims will not burden the courts and the [VA] with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of [VA] policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. 361, 370, 94 S.Ct. 1160, 1167, 39 L.Ed.2d 389 (1974).

It is clear that these purposes would be frustrated if VA employees could be sued in their individual capacity for making veterans' benefits determinations. Instead of flooding already overflowing court dockets with appeals of adverse VA determinations, veterans would commence actions against individual VA employees. In addition, by entertaining lawsuits against VA employees, district courts could affect the "complex" determinations of those employees in deciding to award or deny veterans' benefits for fear of personal liability. Consequently, it is clear that congressional inaction was not inadvertent, and

plaintiff cannot recover damages against the individual defendants.[6]

Motion to Amend

Plaintiff moves to amend his complaint in Sugrue I to name the individual defendants who were named as defendants in Sugrue II. While the denial or grant of a motion to amend is within the discretion of the district court, *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46 (2d Cir.1983) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)), "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman*, the Court stressed the importance of liberally granting leave to amend, unless the court finds "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182, 83 S.Ct. at 230 (emphasis supplied). Cognizant of the liberal amendment policy of the Federal Rules in general, plaintiff's motion to amend must still be denied because it is clear, based on the dismissal of those identical claims in Sugrue II, that the amendment would be futile.

For the foregoing reasons, plaintiff's motion to amend the complaint in Sugrue I is denied, and the government's motion to dismiss both Sugrue I and Sugrue II as against the VA and the individual defendants is granted.

SO ORDERED.

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[6] The individual defendants would also appear to have qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-90-1972

DANIEL SUGRUE, PLAINTIFF

-AGAINST-

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, DEFENDANT

No. CV-91-2041

DANIEL SUGRUE, PLAINTIFF

-AGAINST-

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, AND S. WOHL, ROBERT J. SCHMIDT, JOHN DOES 1-X AND MARY DOES 1-X, THE TRUE NAMES OF SAID DOE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFF AT THIS TIME, DEFENDANTS

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

Plaintiff Daniel Sugrue commenced two actions to challenge his veterans' benefits award: CV-90-1972 ("Sugrue I") and CV-91-1972 ("Sugrue II"). The facts underlying these actions are set forth in this Court's earlier decision, *Sugrue v. Derwinski*, 808 F. Supp.

946 (E.D.N.Y. 1992), familiarity with which is assumed. In that decision, this Court dismissed both actions for lack of subject matter jurisdiction under 38 U.S.C. § 511(a). *Id.* at 949-50. A formal judgment of dismissal in accordance with Fed. R. Civ. P. 58 has entered on December 30, 1992. Plaintiff now moves this Court to amend the facts in *Sugrue* pursuant to Fed. R. Civ. P. 52(b) and to alter or amend the judgment of dismissal pursuant to Fed. R. Civ. P. 59(e) and 60(b). For the following reasons, plaintiff's motions are denied but the earlier decision is amended in part.

At bottom, plaintiff brought this action challenging his benefits award by alleging that the Department of Veterans Affairs ("VA") and its employees violated his constitutional and statutory rights in setting his veterans, disability rating at 50 percent and refusing to revise that disability rating. Since this Court determined that defendant was seeking an increased benefits award and the decisions of the Secretary of the VA are insulated from judicial review under 38 U.S.C. § 511(a), both actions were dismissed for lack of subject matter jurisdiction.

Plaintiff moves this Court under Fed. R. Civ. P. 59(e) to amend the judgment of dismissal. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of judgment."[1] The decision to grant or deny a

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[1] The ten-day period in which a litigant may serve a Rule 59(e) motion must be strictly observed because failure to serve the motion timely precludes the court from revisiting the judgment. *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2d Cir. 1982); *McCarthy v. Manson*, 554 F. Supp. 1275, 1284 n.9 (D. Conn. 1982), *aff'd on other grounds*, 714 F.2d 234 (2d Cir. 1983); Fed. R. Civ. P. 6(b). In this case, the judgment of dismissal

Rule 59(e) motion rests in the sound discretion of the district court. *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983). Moreover, relief is only available under Rule 59(e) if the movant can demonstrate manifest errors of law or fact or newly discovered evidence that was not previously available. *Wallace v. Brown*, 485 F. Supp. 77, 78 (S.D.N.Y. 1979). *See also Farkas v. Ellis*, 783 F. Supp. 830, 832-33 & n.l (E.D.N.Y. 1992) (grounds for relief under Rule 59(e) are equivalent to stated grounds for relief on motion for reargument under Local Rule 3(j), *i.e.*, "where the court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.") (citations omitted), *aff'd*, 979 F.2d 845 (2d Cir. 1992); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 123 (6th Cir. 1982) (newly discovered evidence or fundamental errors of law or fact). Based on the foregoing legal standards it is clear that plaintiff is not entitled to any relief under Rule 59(e). He does not cite any new law in his submissions for post-judgment relief,[2] nor does he cite any new facts

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was entered on Wednesday, December 30, 1992, and plaintiff's Rule 59(e) motion was filed with this Court on Thursday, January 14, 1993. In the absence of a certificate of service, this Court assumes that the Assistant United States Attorney was served on that same day. Under Fed. R. Civ. P. 6(a), where a time period in the procedural rules is less than 11 days, intermediate Saturdays, Sundays and legal holidays, including New Year's Days are excluded from the calculation. Accordingly, plaintiff's motion to amend was timely on January 14, 1993, as that was the tenth day from the entry of judgment not counting the excludable intervening days.

[2] In his Reply Memorandum of Law, plaintiff's counsel frivolously argues for the first time that the jurisdictional bar of 38 U.S.C. § 511(a) and its predecessor, § 211(a), does not apply to veterans who file notices of disagreement before Nov.

which may have been material to this Court's prior decision. Since both Sugrue I and Sugrue II were dismissed for lack of subject matter jurisdiction, the factual errors that plaintiff cites were immaterial and irrelevant to the disposition of those actions.

Similarly, Rule 60(b) does not afford plaintiff any postjudgment relief. While plaintiff does not specify the particular subdivision upon which he relies, it is clear that none of the specified grounds to relief under that rule applies. Rule 60(b) empowers a court to "relieve a party . . . from a final judgment, order or proceeding" for any one of a number of specified reasons. Those grounds include:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other

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18, 1988. Pl's [Reply] Memo. of Law at 1-3. Apparently, plaintiff's counsel is alluding to footnote 5 in *Sugrue* where this Court recognized that plaintiff could not avail himself of the procedures for judicial review in 38 U.S.C. §§ 502, 511(b)(4) because he filed a notice of disagreement in 1984. But plaintiff's counsel overlooks the teachings of *Johnson v. Robison*, 415 U.S. 361 (1974) and *Pappanikoloaou v. Administrator of Veterans Admin.*, 762 F.2d 8 (2d Cir. 1985), *cert. denied*, 474 U.S. 851 (1985), which are cited in this Court's earlier decision and need not be repeated here.

> reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

The granting of relief under Rule 60(b) is committed "to the sound discretion of the district court, and "[m]otions under Rule 60(b) . . . are generally granted only upon a showing of exceptional circumstances." *Mendell in Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), *aff'd*, ___U.S. ___, 111 S. Ct. 2173 (1991). Because plaintiff has not demonstrated any "exceptional circumstances" for this Court to revisit its initial determination, the motion is denied.

Likewise, this Court declines to vacate the judgment of dismissal under the broad "catch-all" provision of Rule 60(b)(6), which authorizes the court to alter a judgment for any other reason justifying relief and which "is applicable only where the more specific provisions do not apply." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 898 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983). A motion under that subdivision is "generally granted only upon a showing of exceptional circumstances," *Mendell*, 909 F.2d at 731, or where the judgment or order poses an "extreme or undue hardship" to a party. *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977). Thus, since plaintiff has not made either requisite showing, Rule 60(b)(6) is not a proper basis for relief.

Plaintiff also moves this Court under Fed. R. Civ. P. 52(b) to amend *Sugrue*, to reflect (1) that Dr. Bennett Derby, the board certified neurologist who examined plaintiff in 1983, was a VA employee[3] and

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[3] *But see* Pl's Memo. of Law in Opp'n to Defs' Mots. to dismiss the Complaint at 6, dated Oct. 15, 1992 ("The

(2) that Dr. Barrett, another neurologist, examined plaintiff in 1987.[4] Rule 52(b) provides that a party may move the court within ten days of entry of judgment to amend its factual findings and to amend the judgment accordingly. However, a motion under Rule 52(b) is not available to amend the facts cited in a written opinion dismissing an action under Fed. R. Civ. P. 12; it is limited to a motion to amend the district court's findings of fact after a bench trial. *Farkas v. Ellis*, 783 F. Supp. 830, 832 (S.D.N.Y.), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

As a final note, this Court is confused as to why plaintiff's counsel has seen fit to repeatedly adopt inconsistent positions in this action. In moving for post-judgment relief and at oral argument on the instant motion on March 26, 1993, counsel stated that plaintiff never sought judicial review of his veterans, benefits award. Decl. of Kevin P. Quill, dated January 13, 1993, at ¶ 5 ("Nowhere in plaintiff's complaints, brief, or other documents submitted to the Court, can it be found that plaintiff argued that he was entitled to a higher rating.") Yet, in both Sugrue I and

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examining physician was Bennett M. Derby, M.D., a board certified neurologist. He was at th[at] time . . . on retainer with the Veterans Administration and *was not an employee.*) (emphasis supplied).

[4] Neither the complaint in Sugrue I nor the complaint in Sugrue II specify the year in which Dr. Barrett examined plaintiff, except that it occurred before the Board of Veterans Appeals "BVA") affirmed plaintiff's assigned disability rating on June 10, 1988. *See* Sugrue I Complaint ¶ 67; Sugrue I Amended Complaint at 80; and Sugrue II Complaint at ¶ 80. Furthermore, plaintiff himself suggests that the BVA affirmed Robert Schmidt's decision upon reviewing both Dr. Derby's and Dr. Barrett's diagnoses. *See* Pl's Memo. of Law, dated Oct. 15, 1992 at 14.

Sugrue II plaintiff expressly asks for such relief. *See* Sugrue I Amended Complaint and Sugrue II Complaint at Prayer for Relief, (f) (asking this Court to "direct[] defendant to place plaintiff in the position he would have occupied but for defendant's unlawful acts and conduct and making him whole for all entitlements and benefits he would have received but for defendant's unlawful acts and conduct.").

Likewise, counsel has stated that this case involved a failure to treat claim. Tr. of Dec. 11, 1992 Oral Arg. at 7-8, 10 (*cited in* Defs' Memo. of Law in Opp'n to Pl's Mot. to Amend at 13). However, that allegation is nowhere to be found in any complaint filed in Sugrue I and Sugrue II, and contradicts plaintiff's counsels statement that "[p]laintiff makes no claims concerning medical treatment." Pl's Memo. of Law, dated Oct. 15, 1992 at 24. *See also* Pl's [Reply] Memo. of Law, dated March 19, 1993 at 2 ("It is conceded that the present [case] is not a type of level of [medical] care case.").

For the foregoing reasons, plaintiff's motion is denied and this Court's prior decision is amended, for clarification purposes only, as follows:

(1) the first two lines on 808 F. Supp at 948 should read:

> physician, Dr. Bennett Derby, who was a VA employee, determined that plaintiff

(2) the second and third sentences of the first full paragraph on page 948 should read:

> Plaintiff was then sent to a psychiatrist, Dr. Abeles. Based on this examination, in a letter . . . ; and

(3) the second sentence of footnote 3 on page 948 should read:

> In this case, plaintiff was examined by two neurologists: Dr. Derby on February 14, 1983 and by Dr. Barrett in 1987.

SO ORDERED.

Dated: Brooklyn, New York
March 26, 1993

/s/ I. Leo Glasser
I. LEO GLASSER, U.S.D.J.